INDEX

Page

Opinions below 1
Jurisdiction 1
Question presented 1
Statute involved 2
Statement 3
A. The Board's findings of fact 3
B. The decisions below 6
Argument 7
Conclusion 10

CITATIONS

Cases:

Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 9-10

District 9, Int'l Ass'n of Machinists v. *National Labor Relations Board*, 315 F. 2d 33 7-8

Great Northern Railway Co. v. *National Labor Relations Board*, 272 F. 2d 741 9

Int'l Rice Milling Co. v. *National Labor Relations Board*, 183 F. 2d 21, reversed on other grounds, 341 U.S. 665 9

Local Union No. 25, Teamsters v. *N.Y., N.H. & H. R.R. Co.*, 350 U.S. 155 10

Local Union 98, Sheet Metal Workers' Int. Assn. v. *National Labor Relations Board*, 433 F. 2d 1189... 8

Marine Engineers v. *Interlake Steamship Co.*, 370 U.S. 173 8

National Labor Relations Board v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 8

National Labor Relations Board v. *Milk Drivers' Union, Local 753*, 392 F. 2d 845 8

Cases (Continued): Page

National Labor Relations Board v. *National Maritime Union*, 486 F. 2d 907, certiorari denied, No. 73-1225, April 29, 1974 8

National Woodwork Mfrs. Ass'n v. *National Labor Relations Board*, 386 U.S. 612 7,9

W.T. Smith Lumber Co. v. *National Labor Relations Board*, 246 F. 2d 129 9

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 2(2) 2,6,8
Section 2(3) 8
Section 2(5) 8
Section 8(b)(4) 2-3,6,8,9
Section 8(e) 3,6,7,8,9
Section 10(*l*) 5

Railway Labor Act, Section 201, 49 Stat. 1189, 45 U.S.C. 181 3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-40a) is reported at 491 F. 2d 367. The decision and order of the National Labor Relations Board (Pet. App. 1a-34a) are reported at 197 NLRB 232.

JURISDICTION

The final judgment of the court of appeals was entered on April 19, 1974 (Pet. App. 43a-45a). The petition for a writ of certiorari was filed on May 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an agreement between a union and an air carrier prohibiting work from

being contracted out to a non-union employer is a secondary boycott or "hot cargo" agreement proscribed by Section 8(e) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

Section 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any person subject to the Railway Labor Act, * * *

* * * * *

Section 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: * * *

STATEMENT

A. The Board's Findings of Fact

Lufthansa, a corporation existing under the laws of the Federal Republic of Germany, provides air transportation of passengers and goods to and from points within the United States and other countries (Pet. App. 3a: R. 34).[1] It is a "carrier by air" within the meaning of Section 201 of the Railway Labor Act, 49 Stat. 1189, 45 U.S.C. 181 (Pet. App. 3a; R. 39).

Lufthansa maintains a catering facility at John F. Kennedy ("JFK") Airport in New York City at which it prepares some of the food for its flights from JFK (Pet. App. 3a; R. 36, 75). In 1961, Lufthansa recognized petitioner Union as the exclusive bargaining representative of its catering employees in a unit certified by the National Mediation Board under the Railway Labor Act. The unit encompasses all catering employees working for

[1] "R." refers to the record in the court of appeals.

Lufthansa in the United States, its territories, and Puerto Rico (Pet. App. 3a-4a; R. 36). Lufthansa has employed catering department personnel only at JFK, however, and has contracted out catering services at the other airports from which it operates. Accordingly, in successive collective bargaining agreements, from 1961 to 1971, the Union has waived its jurisdiction over the non-JFK catering (Pet. App. 4a; R. 97, 120).

Pursuant to this arrangement, Lufthansa was able to maintain the contractual relationship with Marriott In-Flite Services it had begun in 1956, for the catering of all Lufthansa flights from Chicago's O'Hare Airport (Pet. App. 4a; R. 36, 74). Marriott was also used by Lufthansa at Boston (Pet. App. 4a; R. 59). In January 1969, when Lufthansa commenced flights from Los Angeles International Airport, it contracted its catering work to Continental Airlines, whose catering service employees were represented by the Union (Pet. App. 4a; R. 75). Also during this period, Lufthansa contracted out its catering service requirements at other airports to various contractors, all of which, except Marriott, were unionized (Pet. App. 4a; R. 37). On November 30, 1969, Lufthansa discontinued the catering service provided by Continental Airlines at Los Angeles International Airport and, effective December 1, 1969, commenced using Marriott for food service for its flights originating at Los Angeles (Pet. App. 4a-5a; R. 67, 76). About the same time, Lufthansa and Marriott discussed the possibility of the latter's providing catering service for Lufthansa's Boeing 747 flights from JFK (Pet. App. 4a-5a; R. 67-68).

In late 1969, Lufthansa and the Union commenced discussions concerning the renewal of the collective bargaining contract covering Lufthansa's catering employees, then due to expire in July 1970 (Pet. App. 5a; R. 55). During these discussions, the Union pressed Lufthansa to sever

its relationship with non-union caterer Marriott and to engage a union caterer to perform the work contracted out to Marriott (Pet. App. 5a; R. 43, 55). Soon thereafter, Lufthansa informed Marriott that the Union had given it three months to find a union caterer in Los Angeles and that the Union unequivocally refused to permit Lufthansa to contract with Marriott for the Boeing 747 flights at JFK (Pet. App. 5a; R. 43, 55, 68-69).

Eventually, on February 12, 1971, Lufthansa and the Union executed a renewal collective bargaining agreement containing, *inter alia*, a memorandum of understanding (No. 6) providing that, at both Los Angeles and Chicago, Lufthansa would replace non-union employer Marriott with a union catering contractor, Chef's Orchid (Pet. App. 5a-7a; R. 37, 45, 59-60, 62-65, 76-77).[2] In early March 1971, Lufthansa informed Marriott that, pursuant to the above memorandum, Lufthansa was required to terminate Marriott's contracts at Los Angeles and Chicago and engage the union caterer named in the memorandum (Pet. App. 7a; R. 71). Accordingly, Lufthansa terminated its arrangements with Marriott in Los Angeles on May 15, 1971, and planned to cancel the Chicago contract on June 1, 1971 (Pet. App. 7a; R. 38, 39; 77-78). At the same time, Lufthansa engaged union caterer Chef's Orchid to replace Marriott at Los Angeles and Chicago and to supplement its operations at JFK (Pet. App. 7a; R. 77-78, 192).

Marriott then filed unfair labor practice charges with the Board's Regional Director, who, pursuant to Section 10(*l*) of the Act, obtained a temporary injunction from

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[2]The memorandum further provided that, in the event Lufthansa undertakes to perform catering services at other locations, it and the Union would attempt to agree upon a caterer for that location within 60 days. If they did not agree upon "a Union caterer within that period, for reasons of quality, service or price, the company may then select a caterer of its choice." (Pet. App. 6a.)

the United States District Court for the Central District of California, which required reinstatement of the Los Angeles contract and rescission of the notice of cancellation of the Chicago contract (Pet. App. 7a; R. 38, 200-214).

B. The Decisions Below

The Board, one Member dissenting, concluded that the Union and Lufthansa violated Section 8(e) of the Act by entering into and giving effect to the agreement requiring Lufthansa to cease doing business with Marriott and to contract only with union caterers. In reaching this conclusion, the Board found that the Union was primarily concerned with Marriott's status as a non-union caterer and not with preservation of work for the Lufthansa employees whom it represented, especially since the catering work had historically been contracted out except at JFK; Lufthansa's role was therefore that of a neutral bystander in the Union's effort to achieve objectives outside the bargaining unit (Pet. App. 9a).

The Board rejected the contention that Section 8(e) of the Act, which bans secondary or "hot cargo" agreements, was not applicable to the secondary agreement between the Union and Lufthansa because the latter, as an air carrier, is subject to the Railway Labor Act and thus not an employer within the meaning of Section 2(2) of the National Labor Relations Act. The Board held that Congress intended Section 8(e) to have the same scope as Section 8(b)(4)(B), which bans secondary activities, and the latter provision protects "any person," including non-statutory employers, against secondary pressures (Pet. App. 10a-21a). The Board ordered the Union and Lufthansa to cease and desist from maintaining and giving effect to their unlawful agreement (Pet. App. 22a-23a).

The court below enforced the Board's order. It held that there was substantial evidence to support the Board's

factual finding that this case did not involve a dispute between the Union and Lufthansa over the terms and conditions of employment of the latter's employees, buth rather was essentially a dispute between the Union and the non-carrier (Marriott) with regard to matters affecting the latter's employees (Pet. App. 37a-38a). The court also held that the Board was correct in concluding that the protection of Section 8(e) was not limited to employers who are subject to the National Labor Relations Act (Pet. App. 38a-39a).

ARGUMENT

The holding of the court of appeals that Section 8(e) of the National Labor Relations Act proscribing a secondary agreement between a labor organization and a non-statutory employer is correct and not in conflict with other decisions. No issue warranting review is presented.

1. Contrary to the impression the Union seeks to convey (Pet. 15-16), this proceeding does not arise from a dispute between the Union and Lufthansa, but rather from the Union's desire to prevent Marriott, a non-union employer, from doing the catering work for Lufthansa. The Board found, and the court below agreed, that the Union's objective, as reflected in the memorandum of understanding, was not to preserve work for Lufthansa employees, but to insure that employees of any caterer providing services for Lufthansa were represented by a union in dealings with their employer. Since the Union's conduct was not addressed to the labor relations of Lufthansa *vis-a-vis* its own employees but was "tactically calculated to satisfy union objectives elsewhere," the memorandum of understanding was a secondary boycott agreement which ordinarily would be barred by Section 8(e) of the Act. *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 644-645; *District 9, Int'l*

Ass'n of Machinists v. *National Labor Relations Board*, 315 F. 2d 33 (C.A. D.C.); *Local Union 98. Sheet Metal Workers' Int. Assn.* v. *National Labor Relations Board*, 433 F. 2d 1189 (C.A. D.C.); *National Labor Relations Board* v. *National Maritime Union*, 486 F. 2d 907 (C.A. 2), certiorari denied, No. 73-1225, April 29, 1974; *National Labor Relations Board* v. *Milk Drivers' Union, Local 753*, 392 F. 2d 845 (C.A. 7); *National Labor Relations Board* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23 (C.A. 9).

2. The Board correctly concluded that the secondary agreement was not immune from Section 8(e) merely because Lufthansa is not an employer within the meaning of Section 2(2) of the National Labor Relations Act.[3] The term "any employer" used in Section 8(e) need not be read as limited to employers who meet the Section 2(2) definition, but can embrace the class of employers as a whole, if this would best effectuate Congress' objective.

As enacted in 1947, Section 8(b)(4)(A) made it an unfair labor practice for a labor organization to induce or

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[3]The definition of employer in Section 2(2) excludes "any person subject to the Railway Labor Act," and the definition of employee in Section 2(3) excludes "any individual employed by an employer subject to the Railway Labor Act."

Contrary to the Union's further contention (Pet. 17-18), it is a "labor organization" within the meaning of Sections 8(e) and 2(5) of the Act. The Board found (Pet. App. 3a), and the court below agreed (Pet. App. 37a-38a), that, since approximately 88 percent of the Union's membership are employees within the meaning of Section 2(3) of the Act, and more than 96 percent of the Union's collective bargaining agreements are with employers within the meaning of Section 2(2), it is a labor organization within the meaning of Section 2(5). Section 2(5) defines a labor organization as "any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Marine Engineers* v. *Interlake Steamship Co.*, 370 U.S. 173, 182-183.

encourage the "employees of any employer" to engage in a strike for an objective of forcing any employer or other person to cease doing business with any other person. Courts of appeals have held that, in view of Congress' intention to protect neutral employers from secondary activity, "employees of any employer" should be construed to include non-statutory employees, such as railroad employees.[4] In 1959, Congress expressed its approval of these rulings by amending Section 8(b)(4)(A) (which was redesignated Section 8(b)(4)(B)) so as to proscribe secondary pressure against "any individual employed by any person."

The legislative history of Section 8(e) (Pet. App. 11a-17a) indicates, as this Court recognized in *National Woodwork*, *supra*, 386 U.S. at 635, that Congress intended Section 8(b)(4)(B) and 8(e) to be coextensive. Moreover, as the Board noted (Pet. App. 18a), "had IAM induced Lufthansa's employees to strike or engage in other concerted activity to force the Company to cease doing business with Marriott, the Union would have violated Section 8(b)(4)(B)." Thus, Congress' objective would be impaired if "a contract executed by IAM and Lufthansa designed to achieve the identical result was not proscribed by Section 8(e)" (Pet. App. 18a-19a).

An interpretation of Section 8(e) embracing this secondary agreement does not interfere with the relationship of employees and employers subject to the Railway Labor Act. Cf. *Brotherhood of Railroad Trainmen* v. *Jacksonville*

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[4] *Int'l Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21, 25 (C.A. 5), reversed on other grounds, 341 U.S. 665; *W.T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5); *Great Northern Railway Co.* v. *National Labor Relations Board*, 272 F. 2d 741 (C.A. 9).

Terminal Co., 394 U.S. 369, 377, 391; *Local Union No. 25, Teamsters* v. *N.Y., N.H. & H. R.R. Co.*, 350 U.S. 155, 160. As the Board stated (Pet. App. 20a-21a): "Here, the labor organization involved, IAM, is composed overwhelmingly of nonrailroad or nonairline employees, the dispute is not over the terms and conditions of employment of airline employees, but of employees of an employer, Marriott, which is not subject to the Railway Labor Act * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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